

  
Theodore R. Kulongoski, Governor

September 28, 2004

Heather Reynolds  
Attorney at Law  
P.O. Box 145  
Astoria, Oregon 97103

Dear Ms. Reynolds:

This is in response to your correspondence dated September 17, 2004 regarding the application of the conflict of interest provisions of ORS Chapter 244 related to a business, with which a port commissioner is associated, proposing a land lease agreement with the port commission.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF  
OPINION NO. 04S-009**

**STATED FACTS:** A port commission oversees and manages a large inventory of land. A significant portion of the port commission's operations involves leasing land to commercial and industrial tenants.

One commissioner operates a private business and has proposed to lease land next to a marina from the port commission and build a 12,000 square foot commercial building on the land. The terms of the lease proposal conform to port policies and the guidelines used for any other entity.

The port has a current need for public restrooms and prefers to have such facilities available in a multi-use facility. Current tenants have indicated no interest in providing such facilities. The commissioner has indicated a willingness to incorporate public restrooms and storage space in the proposed commercial building. Once completed, the commissioner indicated a willingness to sublet the restrooms and storage space to the port commission.

**RELEVANT STATUTES:** The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

244.020(1) " 'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (14) of this section."

244.020(2) " 'Business' means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity."

244.020(3) " 'Business with which the person is associated' means:"

(a) "Any business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year;"

244.020(15) " 'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services."

244.040 "**Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:"

(1)(a) "No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated."

244.120 **“Methods of handling conflicts; generally; application to elected officials or members of boards.** (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:”

(2) “An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:”

(b) “When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:”

(A) “Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.”

QUESTION NO. 1: Would the port commissioner, who is operating a private business, be able to submit a land lease proposal for that business to the port commission without violating Government Standards and Practices laws?

OPINION: Yes. The commissioner, while a public official, does not lose the ability to engage in private business activities on personal time and without the use of port commission resources. The stated facts indicate that any proposed lease from the commissioner’s business would conform to the same standards as any other private party. Accordingly, the private business of the commissioner could compete for the lease as any other business.

QUESTION NO. 2: Would the port commissioner, who is operating a private business that has submitted a land lease proposal for that business to the port commission, be able to participate in the port commission actions on the lease proposal without violating Government Standards and Practices laws?

OPINION: No. ORS 244.120 provides the methods the port commissioner should use when met with a conflict of interest. Since the port commissioner, whose business submitted the lease proposal, owns a business that would experience a financial impact from the port commission action, the commissioner would be met with an actual conflict of interest. When the commission arrives at the issue of the lease proposal on a meeting agenda, ORS 244.120(2)(b) requires that the commissioner publicly announce the nature of the actual conflict of interest. Further, ORS 244.120(2)(b)(A) requires that the commissioner refrain from participation as a commissioner on the issue.

QUESTION NO. 3: If the business, with which the port commissioner is associated, owns a commercial building on property leased from the port commission, could the commissioner's business sublet a portion or facilities within the building to the port commission without violating the provisions of Government Standards and Practices laws?

OPINION: Yes. If the business owned by the commissioner enters into the sub-lease agreement under the same rules and procedures as any other competing business interest it appears that there would be no violation of ORS Chapter 244. Again, if the issue appears on the agenda of the port commission for action the provisions of ORS 244.120 discussed under the previous question would apply.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.**

Please contact this office again if you would like this opinion submitted to the Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn  
Executive Director